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Supreme Court, U.S.
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No. 03-199

In the Supreme Court of the United States

JERRY R. PIKE, PATRICK A. THOMAS,
Individually and on behalf of others
similarly situated,
Petitioners,

v.

LUCENT TECHNOLOGIES, INC.,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

REPLY BRIEF FOR PETITIONERS

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REASONS FOR GRANTING THE WRIT

I. The Eleventh Circuit's Requirement That an Employment Discrimination Plaintiff Either Introduce Direct Evidence or Demonstrate the Falsity of the Employer's Proffered Explanations Is Inconsistent with this Court's Decision in Desert Palace v. Costa and with Decisions in Several Courts of Appeals

Respondent summarizes at length the exculpatory evidence which it offered. The district court opinion, on the other hand, describes in some detail the inculpatory evidence which that court noted "could support an inference of intentional discrimination." (Pet. App. 30a-31a). The question of law raised by the petition is whether the courts below utilized the wrong legal standard in deciding whether this conflicting evidence warranted summary judgment. Both courts below acted without the benefit of this Court's decision in Desert Palace, Inc. v. Costa, 123 S. Ct. 2148 (2003).

Respondent's description of the legal standard applied by the courts below is entirely consistent with the Petitioners' characterization of the decisions of those courts. First, respondent agrees that in the Eleventh Circuit that a plaintiff cannot establish the existence of intentional discrimination under McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973), unless he or she can prove that the employer's explanation was false. "To demonstrate pretext, a plaintiff must submit sufficient evidence to establish that the employer's stated reasons for its actions are false." (Br. Opp. 16); compare Petition 6 ("of the two methods permitted by the Eleventh Circuit to prove intentional discrimination, one requires that the plaintiff prove that an employer's proffered

explanation is 'false.'"). Second, absent proof of falsity, the plaintiff in the Eleventh Circuit can only avoid summary judgment by adducing "direct evidence of . . . discrimination." (Br. Opp. 19); compare Petition 8 ("The only alternative method of proof permitted by the Eleventh Circuit is 'direct evidence.'")

Given those two undisputed pillars of Eleventh Circuit jurisprudence, summary judgment is legally required in any mixed-motive case unless the plaintiff has direct evidence. Respondent does not question that inexorable meaning of the decision below. See Br. Opp. 26 (A mixed motive case requires "stronger evidence" than other cases.)

Respondent insists that this direct evidence requirement is consistent with Desert Palace because that case arose under Title VII, not the ADEA. (Br. Opp. 24-25). Desert Palace, however, did not fashion a special rule for Title VII cases. To the contrary, the Court held that Title VII cases must conform to the "conventional rule of civil litigation," in which a plaintiff proves his case by a preponderance of the evidence using either direct or circumstantial evidence. The Court observed that direct and circumstantial evidence are treated "alike" and emphasized the critical role that circumstantial evidence has traditionally served in "discrimination cases." 123 S. Ct. at 2154. Emphasizing the breadth of the principle that "the law makes no distinction between the weight or value to be given to either direct or circumstantial evidence," the Court cited Reeves v. Sanderson Plumbing Products, Inc., 530 U.S. 133 (2000), an ADEA case; Rogers v. Missouri Pacific R. Co., 352 U.S. 500 (1957), a case under the Federal Employers' Liability Act; and various criminal law authorities. Id.

Respondent contends that the Eleventh Circuit's falsity requirement is mandated by this Court's decision in Reeves v. Sanderson Plumbing Products, Inc., 530 U.S. 133 (2000), quoting the following passage from Reeves:

> [A] plaintiff's prima facie case, combined with sufficient evidence to find that the employer's asserted justification is false, may permit the trier of fact to conclude that the employer unlawfully discriminated.

530 U.S. at 148, quoted at Br. Opp. 16. But Reeves clearly holds only that proof of falsity is one method of proving unlawful discrimination, not that proof of falsity is the exclusive legally sufficient method of doing so. "Proof that the defendant's explanation is unworthy of credence is simply one form of circumstantial evidence that is probative of intentional discrimination." Reeves, 530 U.S. at 147 (Emphasis added).

The Eleventh Circuit's March 2003 decision is clearly inconsistent with this Court's June 2003 decision in Desert Palace. Even in the wake of Desert Palace, the courts of appeals have remained divided about the issues in this case. Desert Palace rejected in unequivocal and emphatic terms the distinction that had been drawn by many courts of appeals between "direct evidence" and circumstantial evidence. 123 S. Ct. at 2154. Yet following Desert Palace, a number of circuits continue to insist on just such a distinction, and persist in awarding summary judgment because a plaintiff's evidence of unlawful intent was not "direct."[1] The Ninth

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[1] E.g. Cushman-Lagerstrom v. Citizens Insurance Co. of America, 2003 WL 21774017 *8-*9 (6th Cir., July 30, 2003)(supervisor's "disparaging remarks" remarks about female workers were "offensive" but did not meet the Sixth Circuit's

Circuit, on the other hand, has followed this Court's decision in Desert Palace and refused to treat direct evidence as necessarily more probative than circumstantial evidence[2].

Similarly, the courts of appeals since Desert Palace have been divided about whether, absent direct evidence, a plaintiff must prove that an employer's proffered explanation is false. The District of Columbia Circuit has held that, even absent direct evidence, proof of falsity is "[o]ne way" to prove under

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definition of "direct evidence"); Moody v. United States Secretary of the Army, 2003 WL 21983014 *2 (5th Cir., Aug. 21, 2003)(repeated references to plaintiff as "granny" and "old woman" did not meet Fifth Circuit's definition of "direct evidence", but "merely evidence animus directed at [plaintiff] based on her age"); Murphy v. University of Cincinnati, 2003 WL 21774157 *6 (remarks by supervisor that he objected to hiring women not "direct evidence" because plaintiff's complaint alleged discrimination in dismissal not in hiring), *10 (dissenting opinion)(emphasizing probative value of evidence) (6th Cir., July 29, 2003); Paasewe v. Ohio Arts Council, 2003 WL 22017539 *2 (6th Cir., Aug. 25, 2003)("racially derogatory comment" did not meet Sixth Circuit definition of "direct evidence"); Read v. BT Alex Brown Inc., 2003 WL 21754966 *6 (recommendation that firm "hire a young man just out of college who will . . . show these girls . . . how to work" not sufficiently unambiguous to constitute direct evidence), *6 n. 13 (rejecting broader definition of direct evidence in earlier panel decision)(5th Cir., July 30, 2003); Estades-Negroni v. The Associates Corp. of North America, 2003 WL 22244952 (1st Cir., Oct. 1, 2003)(describing and applying First Circuit's definition of "direct evidence"); Lassetter v. Strategic Materials, Inc., 2003 WL 21754986 * 4 n. 7 (5th Cir., July 29, 2003)(describing and applying four-part Fifth Circuit definition of "direct evidence").

[2] Bell v. Clackamas County, 341 F.3d 858, 868 (9th Cir. 2003)(quoting Desert Palace).

McDonnell Douglas the existence of a discriminatory motive[3]. The Seventh Circuit has held direct evidence and falsity are not the exclusive methods for proving intentional discrimination, noting that other types of circumstantial evidence may suffice, such as "ambiguous statements", "suspicious timing", "behavior toward other employees", dissimilar treatment of similarly situated other workers, "and so on".[4] The Fifth Circuit, on the other hand, insists that in the absence of direct evidence a plaintiff must prove the falsity of an employer's proffered explanation; indeed, if the employer proffers five different explanations, summary judgment is required unless the plaintiff shows that all of those explanations are false[5]. In the Sixth Circuit a plaintiff must show either that a proffered reasons had "no basis in fact", or that they "did not actually motivate [the employment action]"[6]. That requirement, by definition, could not be met in a mixed motive case where some non-discriminatory purpose was indeed present. Thus the Sixth Circuit's formulation makes clear the nature and consequence of the falsity rule utilized in the Fifth, Sixth and Eleventh Circuits--summary judgment is unavoidable in any mixed-motive case in which the plaintiff does not have direct evidence. This

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[3] Lathram v. Snow, 366 F.3d 1085, 1088 (D.C. Cir. 2003).

[4] Volovsek v. Wisconsin Dept. of Agriculture, Trade and Consumer Protection, 2003 WL 22146393 (7th Cir., Sept. 18, 2003).

[5] Lassetter v. Strategic Materials Inc., 2003 WL 21754986 (5th Cir., July 29, 2003).

[6] Anthony v. BTR Automotive Sealing Systems, Inc., 339 F.3d 506, 516 (6th Cir. 2003)(emphasis omitted); Seay v. Tennessee Valley Authority, 339 F.3d 454, 463 (6th Cir. 2003).

continued insistence on direct evidence is utterly inconsistent with this Court's decision in Desert Palace.

II. There Is an Undisputed Inter-circuit Conflict Regarding Whether an ADEA Collective or Class Action Cannot Proceed Unless the Name Plaintiff First "Opts In" to His Own Lawsuit

Respondent does not deny the existence of an inter-circuit conflict regarding ADEA collective or class actions. The Eleventh Circuit holds that such an action cannot proceed unless the named plaintiff files with his own complaint a separate written consent to being a plaintiff in his own lawsuit. This rule imposes upon the named plaintiff in such an action a requirement that he opt into his own lawsuit, and do so at the beginning of the action.

As we noted in the petition, several circuits have refused to apply to ADEA actions any requirement that such opt-in agreements be executed at the outset of the litigation. In Sperling v. Hoffman-La Roche, Inc., 24 F.3d 463, 466 et seq., (3d Cir. 1994), the Third Circuit expressly held that the opt-in provisions of the Fair Labor Standards Act do not apply to actions under the ADEA. Respondent does not deny that the Eleventh Circuit's rule conflicts with the rule in other circuits, but merely argues that the court below--not the other circuits--has correctly interpreted the ADEA. At this juncture, however, it is the existence of this inter-circuit conflict which warrants review by this Court.

CONCLUSION

For the above reasons, a writ of certiorari should be granted to review the judgment and opinion of the court of appeals. In the alternative, the Court should grant the write, vacate the decision below, and remand the case for reconsideration in light of Desert Palace Inc. v. Costa.

Respectfully submitted

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